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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 196

AMERICAN CHAIN COMPANY, INC., PETITIONER

v.

ROBERT O. EATON, COLLECTOR OF INTERNAL REVENUE, DISTRICT OF CONNECTICUT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Connecticut (R. 26–51) is reported in 58 F. (2d) 248.[1] The opinion of the Circuit Court of Appeals for the Second Circuit (R. 391–397) is reported in 63 F. (2d) 783.

[1] A preliminary opinion relating only to the jurisdiction of the District Court (R. 9–15) is reported in 58 F. (2d) 246.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 14, 1933 (R. 397). A petition for a rehearing was denied April 7, 1933 (R. 413). The petition for a writ of certiorari was filed June 22, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below had power to determine the sufficiency of the evidence to support the judgment of the trial court.

2. Whether automobile tire chains are accessories of automobiles within the meaning of Section 900 of the Revenue Act of 1921, and the applicable regulations.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 14–22.

STATEMENT

This suit was brought to recover taxes paid by the petitioner as the manufacturer of tire chains such as are commonly used on the tires of automobiles (R. 27). The respondent collected taxes from petitioner in the aggregate amount of $640,508.43 for the period July 1, 1922, to June 30, 1924, on the ground that the chains made by petitioner were automobile accessories (R. 27).

By stipulation the case was tried by the trial judge without the intervention of a jury (R. 20). At the conclusion of the evidence the trial judge made his order, with written opinion (R. 26–51), from which the following recital of facts is summarized:

When the tax was laid, the petitioner reduced its sale prices to customers by the amount of the tax and so stamped its invoices and bills as to indicate that of the amount charged to the customer 1/21 part was required by the sales tax here in question (R. 28). Thereafter the petitioner computed and paid the tax upon the basis of the price thus reduced. The customer paid the same aggregate amount that he had before. The trial judge concluded that as to the first taxable period (1922) the petitioner had sustained the burden of proving that it had itself borne the tax (R. 28), and that as to the other two taxable periods (1923, 1924) in legal effect the tax was collected from the customers, but since the sales price did not change, it was wholly returned to them (R. 28–29).

The chains made by petitioner were sold by it to jobbers and dealers, and the petitioner did not and could not know how many of the chains thus sold were eventually used or purchased for use on "non-taxable" vehicles (R. 30). The chains generally were advertised by the petitioner for use on vehicles other than automobiles (R. 30). Chains were manufactured in many sizes, varying not

only in the length of the side or rim chain, but also in the length of the cross chain, and heavier wire was used in the construction of the larger sizes (R. 30).

Forty-nine sizes of chains, which were designated as to size and amount of tax paid in respect thereof (listed in Schedule "A" annexed to the opinion (R. 51–56)), fitted at least one type of vehicle other than an automobile equally as well as any automobile, and they operated as effectively upon the one class of vehicles as upon the other (R. 30). Wholly without adaptation for the purpose these chains were interchangeable upon such vehicles of both classes as used tires of substantially the same size (R. 30). There was no differentiation, either of construction or of design, in the chains used on the tires of "non-taxable vehicles" from those used on tires of "taxable vehicles" (R. 30). In ordering chains the universal practice was to order by size only, without specifying what kind of vehicle the chain was intended for (R. 30–31).

The mechanical design of petitioner's chains was embodied in patents issued as early as 1904 (R. 31). Chains were in use for automobiles and trucks before the internal combustion tractor came upon the market (R. 31). The number of "taxable vehicles" during the taxable years exceeded the number of "non-taxable motor vehicles" (R. 31).

The trial judge concluded that the sizes listed in Schedule "A" were actually used on "non-taxable vehicles," and that all chains except those listed in such schedule "A" were designed and primarily adapted to use on taxable vehicles, "there being no evidence that they had any other use during such periods" (R. 32).[2] To the extent of the 49 sizes, a judgment for the petitioner was entered (R. 32–33, 51).

On appeal, the Circuit Court of Appeals for the Second Circuit reversed the judgment of the District Court (R. 397).

ARGUMENT

I.

THE CIRCUIT COURT OF APPEALS HAD AUTHORITY TO DETERMINE WHETHER THE JUDGMENT OF THE TRIAL COURT WAS SUFFICIENTLY SUPPORTED BY THE FACTS

The petitioner, relying on Sections 649 and 700 of the Revised Statutes (*infra,* p. 14), contends that the Circuit Court of Appeals erred in overruling the findings and conclusions of the District Court (Br. 15).

Section 649 provides that issues of fact in civil cases may be tried without a jury, and that the finding of the court upon the facts, which may be either general or special, shall have the same effect as the

[2] The record contains much testimony introduced by the petitioner at the trial, directed to proof of use of chains on snow-plows, tractors, fire apparatus, etc. (R. 123–346).

verdict of a jury. Section 700 provides, in part, that when such finding is special, the review by the appellate court may extend to the determination of the sufficiency of the facts found to support the judgment.

In the instant case the trial judge sitting without a jury in accordance with a written stipulation (R. 20) found all of the facts in respect of the chains involved necessary to the legal conclusion which he reached (R. 29–31). These findings were segregated to that part of the opinion (R. 29–42) dealing with Section 900 of the Revenue Act of 1921; and directly following such findings the trial judge stated his reasoning and his legal conclusions on that branch of the case. Later at the same term[3] and before any appeal to the Circuit Court of Appeals, the District Judge made an order constituting the findings of fact and conclusions of law set forth in his opinion, special findings of fact, and conclusions of law (R. 68). Thus the record was such when the case was before the Circuit Court of Appeals as to allow that court to pass on the sufficiency of the evidence under Section 700 of the Revised Statutes, and the court did so.

The petitioner characterizes the findings as "general" (Pet. 9, 37) without citation of au-

[3] See rule 20 of the Rules of the District Court for the District of Connecticut.

thority, and argues (Pet. 16–21) that the order of the District Judge could not make his findings of fact special.

We contend that the findings as made and stated are sufficiently explicit to constitute special findings, and if their technical designation as such was necessary, the District Judge could, as he did, correct the records of his own court within the term and before an appeal. *Insurance Co.* v. *Boon,* 95 U.S. 117, 125–128; *So. Utah Mines* v. *Beaver County,* 262 U.S. 325, 329–330.

In making his findings the District Judge used the expression "I find" (R. 30), and having stated what his findings of facts were, he then designedly stated his opinion as apart from the facts (R. 31). But if the findings as stated in the trial court's decision failed in any particular as to technical form, that was corrected by the order entered by the trial judge during the term. The findings thus set forth were consequently special findings within the meaning of the statute, and the Circuit Court of Appeals, under Section 700, could determine the sufficiency of the evidence to support the judgment.

The cases cited by petitioner do not hold otherwise. In *Fleischmann Co.* v. *United States,* 270 U.S. 349, the question was as to the sufficiency of a bill of exceptions authorized *nunc pro tunc* by the

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trial court *after* jurisdiction had been transferred to the Circuit Court of Appeals (p. 357).

In *Rasmusson* v. *Eddy's Steam Bakery*, 57 F. (2d) 27 (C.C.A. 9th), certiorari denied, 287 U.S. 601, as is disclosed by the language of the brief of the Solicitor General relied upon by the petitioner (Br. 18), *after* the appeal was taken from the District Court, thus transferring jurisdiction, the District Court made an order adopting the opinion as its special findings of fact. Obviously this did not enlarge the scope of review to include matters not before the reviewing court, because such matters were not raised in the trial court at the proper time, or while the case was still before the trial court.

British Queen Mining Co. v. *Baker Silver Mining Co.*, 139 U.S. 222, merely holds on the record there that the "special findings" could not be treated as enabling the reviewing court to determine whether the facts found supported the judgment, because the general findings made could not be disregarded.

Harvey Co. v. *Malley*, 288 U.S. 415, turned on the failure of the plaintiff seeking review in the Circuit Court of Appeals to secure, by exception taken during the trial and properly presented by bill of exceptions, rulings on questions of law made by the trial judge. This was, of course, controlled

by the first clause of Section 700 (*infra*, p. 14), dealing with general findings.

II

THE PETITIONER'S CHAINS WERE PROPERLY TAXED AS ACCESSORIES UNDER SECTION 900 OF THE REVENUE ACT OF 1921

On the merits, the issue in this case is whether the tire chains made and sold by the petitioner were "accessories" of an automobile, as that word was used in Section 900 of the Revenue Act of 1921, and Section 600 of the Revenue Act of 1924, *infra*, pp. 14–15.

Article 16 of Regulations 47 (*infra*, pp. 19–20) defines an "accessory" as

> * * * any article *designed* to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is *primarily adapted* for use in connection with such vehicle, whether or not essential to its operation. (Italics ours.)

And see Article 15 of Regulations 47 (*infra*, pp. 18–19).

In *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583–584, this Court said of these Regulations:

> The regulations also have construed the term "accessory" as meaning any article designed to be used in connection with such vehicle

> to add to its utility or ornamentation and which is primarily adapted for such use, whether or not essential to the operation of the vehicle.
>
> This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong. We think it is not so, but is an admissible construction. * * *. We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted.

The court below said that petitioner's chains were "designed and primarily adapted for automobile use"; that the patent rights secured from the United States specify the adaptability of the chains for automobile use, and that the chains "were described as primarily useful for this purpose" (R. 393). It then said (R. 394):

> It cannot be seriously doubted that the Weed chains * * * were designed and primarily adapted for use in automobile trucks, wagons, other automobiles, and motorcycles. * * *.

It thus appears that the decision below may be adequately rested on the ground that the petitioner's

chains were designed and primarily adapted for automobile use. This conclusion, we submit, is amply supported by the evidence.

The court below also said (R. 395):

> It was concluded below that the primary adaptation rule, referred to in *Universal Battery Co.* v. *United States, supra,* has no application to cases where the appellee, by evidence of subsequent untaxed resales, shows two uses, one of which is the admitted principal use on automobiles and the other is a possible exempted use even though it be a diverted use. *We think such a conclusion ignores the chief or principal use as being determinative of the primary adaptation rule, referred to by the Supreme Court,* and it also assumes evidence of untaxed resales for possible diverted uses, sufficient to override the primary adaptation rule. (Italics ours.)

This language suggests a different test as determinative of primary adaptation, namely, that of chief or principal use. If it be considered that the opinion below rests on that ground, then the decision appears to be in conflict with *McCaughn* v. *Electric Storage Battery Co.*, 63 F. (2d) 715 (C.C.A. 3d), and with *Routzahn* v. *Willard Storage Battery Co.*, 65 F. (2d) 89 (C.C.A. 6th), in the latter of which the Government intends to file a petition for a writ of certiorari.

If this Court should conclude to grant the present petition, the respondent will also rely on Section 424 of the Revenue Act of 1928. (*infra*, pp. 16–17) as a defense. This provision forbids the making of any refund of tax in cases of this sort unless—

> It is established to the satisfaction of the Commissioner * * * that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; * * *

This defense was raised in the District Court and there decided against the Government. The question was again raised in the Circuit Court of Appeals but was not passed upon there because that court concluded that the petitioner had no cause of action in any event.

This question was decided against the contentions of the Government in *Jefferson Electric Mfg. Co.* v. *United States*, 38 F. (2d) 139 (C.Cls.), in which case, following a judgment on the merits for the taxpayer, the Government has filed a petition for a writ of certiorari which is now pending before this Court, No. 171, October Term, 1933.

CONCLUSION

We believe that this case has been correctly decided on the merits. There is no substantial doubt that the court had power to review the evidence.

Nor is the jurisdictional question important in this particular case if the taxpayer cannot succeed on the merits.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

PAT MALLOY,
Assistant Attorney General.

SEWALL KEY,
FRANCIS H. HORAN,
Special Assistants to the Attorney General.

ERWIN N. GRISWOLD,
Attorney.

JULY 1933.

APPENDIX

Revised Statutes:

SEC. 649. Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury (U.S.C., Title 28, Sec. 773).

SEC. 700. When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment (U.S.C., Title 28, Sec. 875).

Revenue Act of 1921, c. 136, 42 Stat. 227, 291:

SEC. 900. That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold

or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

* * * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 322:

SEC. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies

sold or leased for an amount in excess of $200 (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. * * *;

(2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. * * *;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. * * *;

* * * * *

(U.S.C., Title 26, Sec. 881.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 866:

SEC. 424. REFUND OF AUTOMOBILE ACCESSORIES TAX

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer, or importer in respect of the tax imposed by subdivision (3) of section 600 of the Revenue Act of 1924, or subdivision (3) of section 900 of the Revenue Act of 1921 or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer, or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer, or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond, in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner.

* * * * *

Treasury Regulations 47, Revised December, 1921:

ART. 14. *Tires, inner tubes, parts, and accessories sold to manufacturers.*—The words "tires, inner tubes, parts, or accessories" shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as "tires, inner tubes, parts, or accessories," and shall not be understood to embrace raw materials used in the manufacture of such articles.

* * * * *

Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a "part or accessory."

* * * * *

ART. 15. *Definition of parts.*—A "part" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use

and which is primarily adapted only for use as a component part of such vehicle.

* * * * *

Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not "parts" within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

* * * * *

ART. 16. *Definition of accessories.*—An "accessory" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

* * * * *

Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motorcycles are not subject to tax as "parts" or "accessories." * * *.

If any doubt exists as to the special adaptability of any article, the fact of its

sale by the manufacturer to be used with an automobile, or to an automobile accessories dealer, would determine its taxability.

* * * * *

Treasury Regulations 47, Revised August 1924:

ART. 15. *Tires, inner tubes, parts and accessories sold to manufacturers.*—The tax of 2½ per cent applies to *all* tires, inner tubes, parts, or accessories sold separately by the manufacturer thereof, unless the sale is made to a manufacturer who furnishes a certificate in the form provided in this article for the exemption of such sale. * * *.

The words "tires, inner tubes, parts, or accessories" shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as "tires, inner tubes, parts, or accessories," and shall not be understood to embrace raw materials used in the manufacture of such articles.

* * * * *

ART. 16. *Parts or accessories—Definition of parts.*—A "part" for an automobile truck, automobile wagon, or other automobile chasis or body, or motorcycle, is any article designed or manufactured for the special purpose of being used as, or to improve, repair, or replace, a component part of any

such vehicle, or article, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, or which is primarily adapted only for use as a component part of such vehicle or article.

Definition of accessories.—An "accessory" for an automobile truck, automobile wagon, or other automobile chassis or body, or motorcycle, is any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or any article which is primarily adapted for use in connection with such vehicle or article whether or not essential to its operation or use.

* * * * *

Articles which have a general commercial use and which are not especially designed or peculiarily adapted for use in connection with automobile truck, automobile wagon, or other automobile chassis or bodies, or motorcycles, are not subject to tax as "parts or accessories." * * *.

Mere stock or commercial commodities such as bolts, nuts, washers, screws, etc., though used as components for taxable articles, are not "parts" within the meaning of subdivision (3) when sold separately. Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or con-

struction, they are primarily adapted for use as component parts of such vehicles.

* * * * *

Parts or accessories for automobile trucks automobile wagons, other automobiles, or motorcycles, primarily adapted for use on or in connection therewith are taxable when sold by the manufacturer thereof regardless of the purpose for which used.

U. S. GOVERNMENT PRINTING OFFICE: 1933